85-1476

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY,
PETITIONER

versus

JAMES FLOWERS,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
WILLIAM C. CREDO, III
ASSISTANT DISTRICT ATTORNEYS
RESEARCH & APPEALS
OFFICE OF THE
DISTRICT ATTORNEY
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020

APPENDIX "D"

Judgment

And

Findings Of Fact And Conclusions Of Law

Of The

United States District Court

For the Eastern District Of Louisiana

Consisting Of Pages D-1 Thru D-20

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JAMES FLOWERS	CIVIL ACTION
VERSUS	NO. 85-1564
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola	SECTION "J"

JUDGMENT

Pursuant to the findings fo fact and conclusions of law rendered this date,

IT IS ORDERED, ADJUDGED and DECREED that the Application of or Writ of Habeas Corpus be and is hereby DENIED.

New Orleans, Louisiana, this the 1st day of May, 1985.

s/PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JAMES FLOWERS	CIVIL ACTION
VERSUS	NO. 85-1564
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola	SECTION "J"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, James Flowers, seeks habeas corpus relief and a stay of execution. This Court originally denied all relief and rendered its reasons for so doing on April 16, 1985. The Fifth Circuit Court of Appeals vacated and remanded this cause with instructions to obtain and review the transcript of the trial proceedings in state court, to review Petitioner's claims in light of that record and to enter new findings and conclusions as necessitated. Having reviewed the transcript of the trial proceedings in state court, and having re-examined Petitioner's claims in light of those proceedings, this Court hereby renders the following findings of facts and conclusions of law.

Petitioner asserted ten separate grounds for relief. First Petitioner asserted that the jury instructions at the guilt/innocence trial were unconstitutional in that the instructions impermissably relieved the state of its burden of proving specific intent to kill beyond a reasonable doubt. Petitioner specifically asserted that the following instruction was unconstitutional in that it allowed the jury to convict without a finding that petitioner had the requisite intent to kill:

> In other words to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it in another way, that her or they aided, abetted and assisted in the perpetration of the offense.
>
> All persons knowing the unlawful intent of the person committing the crime who were present, consenting thereto, and aiding or abetting, etiher (sic) by furnishing the weapons of the attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals, and equal offenders, and subject to the same punishment.

In support of this assertion, Petitioner cited Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir.

1982). This Court finds that the jury instructions given in Clark are distinguishable from those of the case at bar. In Clark, the instructions were such as to allow a reasonable juror to deem a co-defendants (sic) acts to be intended by Clark, thereby relieving the state of its burden of proving specific intent to kill on the part of Clark.

In the case at bar, no reasonable juror could have misconstrued the instructions given in such a way as to convict the defendant, Petitioner, without a finding that the Petitioner had the requisite intent to kill. The instructions as a whole were clear. The trial judge repeatedly instructed the jury that they could not convict the defendant of first degree murder unless they found that the defendant had killed or had the specific intent to kill:

> First degree murder is the killing of a human being:
>
> When the offender has the specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of (one of the following crimes).

(Jury instructions, Tr. Vol. I, pg. 57)

* * * * * * * * * * *

Thus, in order to convict the defendant upon this definition of first degree murder you must find:

1) That the defendant killed the victim; and

2) That the defendant had the specific intent to kill or to inflict great bodily harm; and

3) That the defendant was engaged in the perpetration or attempted perpetration of (one of the following crimes).

(Jury instructions, Tr. Vol I, pg. 60)

Additionally, the trial judge instructed the jury on the meaning of specific and general intent:

Criminal intent may be specific or general.

Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act.

General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. General criminal intent is always present when there is specific intent.

Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. (emphasis in original)

(Jury instructions, Tr. Vol I, pg. 63)

Thus, a reading of the given instructions as a whole leads this Court to conclude that the jury could not have convicted the defendant of first degree murder unless it found that defendant had the specific intent to kill. Additionally, that portion of the jury instruction which Petitioner quoted to this Court as being defective was taken completely out of context. Indeed, Petitioner misled this Court by failing to quote the entire passage. Where Petitioner's quotation ends, the jury instructions continue as follows:

> To render one guilty as a principal he must have committed the offense himself or in some way participated in the commission of the crime, or he must have aided or abetted the actual perpetrator of the deed before it might be said that he was concerned in the commission of the crime. Mere presence at the time the offense is committed without intention to participate or in any way contribute to its commission, is not sufficient to make one a principal. Mental approval or sympathy with the perpetrator of the crime or with the act done, or acquiescence in its commission, or failure to make any effort to prevent its commission or to apprehend the offender is not sufficient to make one a principal. Mental approval or sympathy with the perpetrator of the crime or with the act done, or acquiescence in its commission, or failure to make any effort to prevent its commission or to

> apprehend the offender is not sufficient to make one a principal. Thus, one who does nothing to encourage or aid in its commission, cannot be said to be a principal unless he be present acting in concert with the actual perpetrator of the offense for the purpose of assisting, if necessary, or of watching and preventing interference or detection, or for the purpose of lending encouragement to the perpetrator or to the commission of the offense.

(Jury instructions, Vol I, pp. 66-67)

Thus, the state trial court judge thoroughly negated any possibility of a conviction based upon the imputation of intent to another. To put it another way, the jury was made well aware that it could not convict the defendant of the charge of first degree murder without a finding of the requisite intent. The government was not relieved of its burden of proof. The Court therefore concludes that Petitioner's first ground for relief is meritless.

Petitioner's second ground for relief is related to the first ground and is equally without merit. Petitioner asserted that the trial court erroneously failed to re-instruct the jury at the sentencing phase that they could not return a death sentence unless

Petitioner had killed or had the specific intent to kill, citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982); Reddix v. Thigpen, 728 F.2d 705, rehearing den., 732 F.2d 494 (5th Cir. 1984); and, Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983).

First, the Court notes that there is no requirement that the state trial court re-instruct the jury at the sentencing phase. The state trial judge properly instructed the jury at the sentencing phase as to the aggravating and mitigating circumstances which they should examine in recommending the penalty to be imposed. (Tr. Vol. I, pp. 70-73).

Second, having previously determined that the jury was properly instructed at the guilt/innocence phase, and further having found that the jury could not have found Petitioner guilty of first degree murder without specifically finding that Petitioner had intended to kill, the Court finds that there was no continuation of error into the sentencing phase.

Third, the Enmund line of cases cited by Petitioner are clearly distinguishable from the case at

bar. In Enmund the court had affirmatively instructed the jury that the defendant could be convicted without a finding that the killed or intended to kill. In Reddix, the jury was led to believe it could convict by imputing the intent of the accomplice to the petitioner. In Skillern, the court upheld instructions which permitted a conviction on the substantive offense without a finding of personal culpability and further upheld separate sentencing instructions which the court found did not violate the Enmund rule which prohibits capital punishment imposed on one based upon the act of an accomplice. Skillern did not impose any requirement that separate instructions be given at the sentencing phase.

Therefore, Petitioner's claim is not supported by this line of cases for the instructions given in his trial were not misleading and clearly spelled out the elements needed for a conviction of first degree murder. The requisite intent being found, the jury was permitted to return the death penalty. Enmund, supra.

The third ground for relief asserted by Petitioner was that he had ineffective assistance of counsel. On this ground, a full evidentiary hearing was held in the state court on Petitioner's state habeas petition. A thorough review of the transcript of that hearing reveals that the state judge heard evidence on each of the specific challenged instances of conduct. The judge concluded first, that Petitioner failed to show his counsel's conduct was deficient, i.e., that Petitioner had reasonably effective assistance of counsel, and, second, that even assuming that counsel's conduct was deficient in the challenged respects, Petitioner did not suffer prejudice in that he failed to show a reasonable probability that the outcome of the case would have been different. This Court can find no manifest error in the state court's conclusions. Strickland v. Washington, 104 S.Ct. 2052, (1984)

The Petitioner next sought relief on the ground that jurors with reservations about capital punishment were improperly excluded. In his petition for relief, Petitioner claimed:

> Although these jurors, Nelson and Camut, expressed severe reservations concerning capital punishment and expressed an extreme reluctance to consider the imposition of the death penalty, they did not make it unmistakeably clear that they would automatically vote against the death penalty regardless of the facts and circumstances, so they could not properly be excluded for cause according to the test of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). (emphasis in original)

Federal Habeas petition, Pg. 12)

A reading of the trial transcript reveals that the petition utterly mischaracterizes and misrepresents the responses of the jurors to questions of the voir dire. On questioning, Mr. Camet revealed a moral conviction against the imposition of the death penalty of some duration. (Tr. Vol II, pp. 319-320) More extensive questioning ensued:

> Q. . . . Could you consider the imposition of the death penalty as a possible alternative if the evidence so warrants it?
>
> A. No, I don't think I could. No.
>
> Q. Is there any circumstances in your mind that you could consider the imposition of the death penalty?
>
> A. No.

Q. No matter how heinous the crime, no matter what evidence the State may present to you. Okay, you, under no circumstances, because of your long standing personal and moral beliefs do not feel that that would be an appropriate sentence?

A. I would not respond to the crime of murder with a death penalty.

Q. Okay. You don't feel that the death penalty is an appropriate sentence of murder, or for any crime?

A. Yes, that is what I am saying.

* * * * * * * * * * *

Q. You could consider life, but you could not consider the death penalty?

A. That is correct.

* * * * * * * * * * *

Q. . . .Your testimony is that under no conceivable set of circumstances could you vote for the death penalty.

A. That is correct.

(Voir dire of Mr. Camet. Tr. Vol. II, pp. 320-322)

The second juror, Mr. Nelson, revealed that he could not impose the death penalty due to a religious conviction. (Tr. Vol II, pp. 348-349) Again, extensive questioning ensued:

Q. . . . Sir, you mentioned that you have personal feelings against the imposition of the death penalty?

A. Right.

Q. Have you had that for quite some time?

A. Right.

Q. And that would be regardless of what the evidence would show?

A. Right.

* * * * * * * * * * *

Q. And what you're telling me is that regardless of the circumstances, regardless of what the evidence would show, you could not even consider the death penalty as an appropriate sentence, as an appropriate verdict in this case?

A. Well I think it would be more or less against my religion.

Q. Against your religion. I will give you one that may be personal to you, if this was the trial of the rape and murder of your cousin, okay. And you were on the jury, could you consider the death penalty?

A. No, sir.

* * * * * * * * * * *

Q. So, what you're saying under no circumstances, no matter what the evidence would show, would you ever consider the imposition of the death penalty?

A. I would prefer life.

Q. You could not consider it?

A. Not death.

Q. That is because of your religious beliefs?

A. Yes?

* * * * * * * * * * *

Q. Mr. Nelson, do you appreciate the fact that the law requires that you only consider the death penalty as an appropriate penalty, and then you can either vote to accept it or reject it?

A. Right. Well, if it was up to me, I would reject it right off.

Q. No matter what anyone had ever done?

A. Well, I was always taught that you would never take a life.

Q. Mr. Nelson, the requirement is that you only be able to consider, and if you were in the courtroom yesterday, you probably heard me ask a prospective juror if she could vote for the death penalty for Adolph Eichmann who was a man who put six million Jew in the gas chamber. Okay. And I now ask you if evidence came out on the stand that somebody had murdered six million people, could you consider the death penalty?

A. Well, I think along the line that he would have to answer himself, why should I give him the death penalty.

Q. I didn't quite understand that answer. Even for Adolph Eichmann --

A. In other words, he would have to answer for himself. It's not for me to judge, you know. I mean as far as I had to convict whether he was guilty or not, yeah, but to impose the death penalty, I wouldn't.

(Voir dire of Mr. Nelson. Tr. Vol II, pp. 348-351)

As can be seen, these jurors clearly passed the stringent Witherspoon test which states that jurors may properly be excluded for cause if they make it "unmistakeably clear" that they would "automatically" vote against capitol punishment without regard to the evidence. Witherspoon v. State of Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Furthermore, the Witherspoon test has been modified. Wainwright v. Witt, (U.S. S.Ct. No. 83-1427, slip opinion, decided January 21, 1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980).

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above-quoted standard when a prospective juror may be excluded for cause because of his or her views on capitol punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic"

> decision making, this standard likewise does not require that a juror's bias be proved with "unmistakeably clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

Wainwright, supra at pp. 11-12.

The Wainwright Court went on to explain that because of the nature of the voir dire, and the lack of clarity in the standard for juror exclusion, great deference must be accorded the trial judge's findings which are presumed correct under 28 U.S.C. 2254(d). Wainwright, supra at pp. 13-17.

Based on the foregoing, this Court concludes that the two jurors in question were properly excluded for cause. This Court will not second guess the state trial judge, who had the advantage of observing and listening to the jurors. This fourth ground for relief asserted by Petitioner lacks merit.

For a fifth ground for relief, Petitioner asserted that the State Supreme Court's review of the Petitioner's sentence was constitutionally inadequate in that the Court only reviewed death sentences within

the same judicial district instead of reviewing death sentences on a state wide basis. Petitioner compared his own proportionality review (State v. Flowers, 442 So.2d 704 (La. 1981)) with that of the defendant in State v. Narcisse, 426 So.2d 118 (La. 1983).

In Narcisse, the Court reviewed similar murder prosecutions on a state wide basis. Although the Court did not express its reason for doing so with specificity, the reason is patent on the face of the opinion. In Narcisse, there had only been four (4) murder prosecutions in the same district as the defendant, and only in the defendant's case was the death penalty returned. In order to adequately review the imposition of the death penalty in the Narcisse case, therefore, the Court examined similar cases in other judicial districts. 426 So.2d at 138.

On the other hand, in the case at bar, the Supreme Court reviewed twenty-two first degree murder cases in the defendant, Petitioner's district. Of those twenty-two, the death penalty had been imposed six times with the Court concluding that the imposition

of the death penalty in the Flowers case was not disporportionate (sic). 441 So.2d at 718-19.

This Court concludes that the review of Petitioner's sentence was not deficient and did not violate the Petitioner's constitutional rights. The State Supreme Court adequately reviewed the sentence before affirming the imposition of the death penalty. See also, Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1980).

The sixth ground for relief asserted by Petitioner equally lacks merit. Petitioner asserted that statements introduced at trial were inadmissable as being unconstituionally obtained pursuant to a stop and subsequent arrest made without probable cause. The Louisiana Supreme Court exhaustively reviewed this ground in State v. Flowers, supra at 711-715. This Court finds no manifest error in the State Supreme Court's determination that the inculpatory statements and evidence were properly admitted at trial.

Petitioner's seventh, eighth, ninth and tenth grounds for relief are general in nature and are not

supported by case law. The seventh ground asserted is that electrocution is cruel and unusual punishment and that in light of other available methods involving unconsciousness and death without pain, the method to be employed violates the Eighth and Fourteenth Amendments to the United States Constitution.

Louisiana prescribes that execution will take place by electrocution. La. R.S. 15:569. This Court cannot act as super legislature; nor can this Court agree that electrocution is "cruel and unusual punishment" within the meaning of the Constitution. Watson v. Blackburn, ____ F.2d ____ (5th Cir. #85-3152, March 18, 1985).

The eighth ground for relief asserted that the sentence is invidiously discriminatory in that it is overwhelmingly imposed against males and poor persons. Louisiana's capitol punishment scheme had been upheld and this Court finds that the scheme for review of death penalty cases in Louisiana passes constitutional muster. See, Baldwin, supra; Watson, supra.

The ninth ground asserted that the death penalty is excessive and cannot be justified. This Court is bound by the United States Supreme Court's repeated holdings that the death penalty is in fact constitutional and can justifiably be imposed.

The final ground asserted generally that the cumulative effect of state and federal constitutional violations is a violation of itself of Petitioner's constitutional rights. Finding no violations of Petitioner's rights, this Court concludes that this last assertion is equally without merit.

In summary, the Court finding that the Petitioner has asserted no valid claim upon which the requested relief could be granted, the Application for a Writ of Habeas Corpus should be denied. Judgment shall be rendered accordingly.

New Orleans, Louisiana, this the 1st day of May, 1985.

s/ PATRICK E. CARR
UNITED STATES DISTRICT JUDGE